Supreme Court, U.S.
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No. 96-1625

In The

Supreme Court of the United States

October Term, 1996

RICHARD DELK and HAROLD RAMSEY, on behalf of themselves and as representatives of the class herein defined,

Petitioners,

v.

FORD MOTOR COMPANY; FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioners seek this Court's review based on the following stated questions:

> (1) Whether a defined trustee[1] under an ERISA-governed plan may rely upon actions performed by non-fiduciaries in order to sustain the fiduciary standard of care?
>
> (2) Whether a corporate fiduciary may rely upon its ignorance of its own conduct in demonstrating its proper discharge of its fiduciary duty?

Respondents, Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan ("Ford" and "SUB Plan"), contend these questions cannot properly be brought in this Petition since Petitioners never raised them before and they were never decided by the Court of Appeals for the Sixth Circuit. Moreover, the District Court, the only court to examine these particular questions, correctly decided after trial that Ford had satisfied its fiduciary duty in all regards.

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[1] The defined trustees of the Ford-UAW Supplemental Unemployment Benefit Plan were Manufacturers National Bank of Detroit and Continental Illinois Bank, N.A., neither of which has been identified as a respondent in this Petition since they were dismissed as parties to this action, by agreement of the parties, at the commencement of the trial in the District Court.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named on the caption to the Petition and this Brief in Opposition.

RULE 29.6 LISTING

Pursuant to Sup. Ct. R. 29.6, Respondents state that Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%:

Associates First Capital Corporation
Great Mall of the Bay Area Management Company
The Hertz Corporation

Argentina
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil
- Autolatina Comercio e Participacoes Financerias Ltd.

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft

Holland
- Ford Nederland B.V.

Japan
- Mazda Motors Corporation

RULE 29.6 LISTING – Continued

Korea
Ford Motor Company of Korea

Netherlands
Ford Credit B.V.

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan (hereinafter "Ford" and "SUB Plan"), respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the September 16, 1996 Opinion Affirming rendered by the United States Court of Appeals for the Sixth Circuit. That Opinion is reported at 96 F.3d 182 (1996).

OPINIONS BELOW

The Opinion Affirming of the United States Court of Appeals for the Sixth Circuit is reprinted as Appendix A to this Brief in Opposition, pages App. 1 through App. 23. The Opinion of the United States District Court for the Western District of Kentucky at Louisville granting judgment to the Defendants/Respondents after trial is reprinted in the Appendix to the Petition, pages 1a-41a.

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

1. Employee Retirement Income Security Act, 29 U.S.C. §§1104, 1132.

2. Trade Act of 1962, 19 U.S.C. §§2271, *et seq.*

STATEMENT OF THE CASE

Petitioners in this case claim Respondents breached their fiduciary duty in administering the Supplemental Unemployment Benefit Plan ("SUB Plan"), part of the collective bargaining agreement between Ford Motor Company and the United Autoworkers, during the late 1970's and early 1980's when American automobile manufacturers were experiencing a financial crisis due, in part, to foreign competition. Respectfully, the Petition does not summarize adequately or accurately the evidence heard at trial of this matter. Respondents, therefore, incorporate by reference the statement of facts in the Opinion Affirming of the United States Court of Appeals for the Sixth Circuit, Section I, pages App. 3 to App. 19, attached as Appendix A to this Brief in Opposition.[2]

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[2] The Court of Appeals' statement of facts is entirely consistent with the District Court's findings of fact. As the Court of Appeals noted, "Appellants do not challenge the district court's findings of fact,. . . . " [Appendix A, p. App. 3]. Nevertheless, the Petition is replete with misstatements and inconsistencies. For example, Petitioners characterize SUB benefits as automatic or "guaranteed" [Petition at 3] and state that Ford had a fiduciary "obligation to seek alternative funding" for the SUB Fund as employees were laid off [Petition at 5]. In fact, the SUB Plan specifies that no person has a vested interest in any SUB monies [Art. VII, §7, Appendix B, p. App. 38], and this Court has recognized that SUB benefits are not guaranteed:

> The concept of supplemental unemployment benefits evolved from the demand by organized labor for a guaranteed annual wage. When it became evident that a guaranteed annual wage was impractical in their industries, unions such as . . . the United

REASONS FOR DENYING THE PETITION

Undaunted by the consistent rulings of the District Court and Court of Appeals for the Sixth Circuit in this case that Petitioners have proven no breach of fiduciary duty and the District Court applied correct standards of review, Petitioners now seek yet another review of their meritless action. Their attempt must fail, however, for two reasons. First, the questions they seek to present to

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> Autoworkers transformed their guaranteed annual wage demands into proposals to supplement existing unemployment compensation programs. These proposals ultimately were adopted in several industries in the form of SUB plans.

Coffy v. Republic Steel Corp., 447 U.S. 191, 200 (1980). Moreover, the SUB Plan specifically contemplates that demand for benefits might reduce the SUB Fund to zero [Art. VII, §5, *e.g.*, Art. VII §5(e), Appendix B, p. App. 32]. In *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), a case relied upon below by Petitioners and involving a SUB plan virtually identical to Ford's, the Sixth Circuit noted that employees "accepted the risk that the SUB benefits would become depleted. . . . " *Drennan, supra* at 249.

Contrary to Petitioners' statements that Ford had no contemporaneous knowledge about the Chrysler strategy for seeking TRA benefits [Petition at 4-5, 6], the record demonstrates that Ford officials not only knew about the Chrysler strategy but assisted the UAW in gathering information necessary to implement it [Petition Appendix, pp. 11a-12a, ¶¶23-24]. Petitioners' suggestion that Ford was lax about recouping SUB overpayments created by the government's retroactive TRA payments to most laid-off Ford employees is also wrong [Petition at 6]. In fact, Ford used the only means available to it, the recoupment process set out in the SUB Plan, and did so expeditiously. [*See*, Appendix A, pp. App. 15 to App. 18, App. 22 to App. 23].

this Court were never addressed or decided by the Court of Appeals. Second, there are no conflicts among the circuits on the issues presented nor are there any "compelling reasons" that would justify a Writ of Certiorari here. Sup. Ct. R. 10.

(A) The Issues Petitioners Ask This Court to Address Were Never Considered by the Court of Appeals

Certiorari should be denied because the particular issues identified by the Petitioners were never presented to the Court of Appeals.

> Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Lawn v. United States*, 355 U.S. 339, 362-363, n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

In *Adickes*, the petitioner listed in her certiorari petition an issue which had been addressed by the District Court but never appealed to the Court of Appeals. The Supreme Court declined to review that issue because "the Second Circuit did not rule on these contentions." *Id.* The same is true here.

These Petitioners took one primary and one secondary issue to the Court of Appeals for the Sixth Circuit:

> The primary issue in this case is the proper standard of care applicable to the fiduciary-employer of an ERISA-governed Plan designed to provide benefits to workers laid off by the

> employer. The District Court applied an arbitrary and capricious standard, when the proper standard should be that of a reasonably prudent person acting in like or similar affairs. A secondary issue is whether plaintiffs have standing to recover benefits directly to them, as opposed to the Plan.

Brief for Appellants, Delk and Ramsey, filed in the Sixth Circuit 7/11/95, p. 2. These are the precise issues determined by the Court of Appeals. *See*, Appendix A, pp. App. 19 to App. 22.

The current Petition abandons those two issues. Now, instead of challenging the standard of care under ERISA which was applied by the District Court and affirmed by the Court of Appeals, Petitioners argue that SUB plans are in some undefined way unique among employee benefit plans so that ERISA/common law trust principles cannot apply to determine whether a breach of fiduciary duty has occurred, and this Court should fashion a brand new rule of law [Petition at 7].[3] This issue was never raised in or addressed by the Court of Appeals. In fact, Petitioners argued below that a standard of care provided by ERISA/common law trust principles, the reasonably prudent person standard, should apply.

Nor does this case present any "exceptional circumstances" which would warrant bending the rule that this

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[3] This issue is gleaned from the body of the Petition. The two issues articulated by Petitioners as "Questions Presented For Review" are merely particularized statements of the issue of whether Ford breached its fiduciary duty under the SUB Plan. None of these questions was ever raised in or addressed by the Court of Appeals.

Court will not consider issues never presented to the Court of Appeals. *United States v. Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This case does not deal with a conflict between state and federal statutes, as did *Youakim*. Denying review of these issues would not result in the case being decided on "a serious misapprehension of federal constitutional law," as in *Mendenhall*. *Id.* at 551-552 n.5.

Simply put, the issues presented in this Petition were never raised in the Court of Appeals. It is improper, therefore, for Petitioners to seek review of these issues, and Respondents respectfully submit that certiorari should be denied on that basis.

(B) There Are No Compelling Reasons That Justify a Writ of Certiorari Here

1. SUB plans have long been governed by ERISA/common law trust principles

Not only have the issues Petitioners ask this Court to review never been raised before in this litigation, they are diametrically contradictory to the legal position taken by the Petitioners before the District Court and the Court of Appeals. Below, Petitioners consistently acknowledged that ERISA/common law trust principles do apply to SUB plan cases by arguing that one of the ERISA/common law trust standards of care (reasonably prudent person) was the appropriate standard for assessing Ford's conduct, as opposed to another ERISA/common law trust standard (arbitrary and capricious). Now, for the first time, Petitioners argue that traditional trust law principles, as

embodied in ERISA law, do not "fit" a case involving a SUB plan and urge the Court to conjure up a new rule of law.

Petitioners acknowledge that ERISA/common law trust principles create a fiduciary duty, but they want this Court to redefine the standard for reviewing a fiduciary's conduct without reference to ERISA/common law trust rules and with no guidance whatsoever from Petitioners. They demand this without ever having raised the question before the Court of Appeals.

Petitioners' demand does not present this Court with a compelling reason for granting certiorari. There is nothing that makes SUB plans different from other employee benefit plans and there is absolutely no need to fashion a new rule of law relating to the standard of care for fiduciaries of SUB plans. Contrary to Petitioners' assertion, the fact that "the employer [Ford] is both the settlor of the trust and the trustee" [Petition at 7][4] is not unique to SUB plans. Other employee benefit plans, for example, self-funded pension and health plans, are structured the same way.

Moreover, courts uniformly have recognized that SUB plans are "employee welfare benefit plans" subject to ERISA. *See, e.g., Adams, et al. v. General Tire & Rubber Company Supplemental Unemployment Benefit Plan*, 794 F.2d 164 (4th Cir. 1986); *Justice v. Bankers Trust Co., Inc.*, 607 F.

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[4] There is no question that Ford is *not* the trustee of the SUB Plan. The designated trustees were Manufacturers National Bank of Detroit and Continental Illinois Bank, N.A. [*See*, Art. VII, §1, Appendix B, p. App. 24]. This argument is flawed, however, even if Petitioners intended to use the word "fiduciary."

Supp. 527 (N.D. Ala. 1985); *Lumpkin v. International Harvester Co.*, 125 L.R.R.M. 2244 (N.D. Ill. 1986). As such, SUB plans are subject to the same ERISA/common law trust principles and rules of law as any other employee welfare benefit plan under ERISA. Courts have had no difficulty whatsoever applying ERISA/common law trust principles to determine whether a fiduciary breached its fiduciary responsibilities under a SUB plan. *See, Lumpkin v. International Harvester Co., supra; Adams, et al. v. General Tire & Rubber Company Supplemental Unemployment Benefit Plan, supra.*

In fact, the case Petitioners relied upon most significantly in the courts below, *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), addressed precisely that issue in the context of a SUB plan. As Petitioners carefully pointed out in their brief to the Court of Appeals, *Drennan* determined whether General Motors had breached its fiduciary duty under the SUB plan by analyzing precisely the same ERISA provisions that have governed the Courts' consideration in the present case.

> The intent of Congress in enacting ERISA was to protect the "interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans."

977 F.2d at 250, *quoting* 29 U.S.C. §1001(b). Continuing, the Court quoted 29 U.S.C. §1104(a)(1) with approval. This statute holds that the fiduciary must exercise its duties:

> With the care, skill, prudence, and diligence under the circumstances then prevailing

> that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
>
> 977 F.2d at 251, *quoting* 29 U.S.C. §1104(a)(1)(B) . . . Accordingly, in the context of a SUB plan, the *Drennan* court found that the manufacturer was a fiduciary in the context of the administration of the plan, and that the prudent man standard would be applied to its conduct.

Petitioners' brief to Court of Appeals at 21. Having argued so vehemently below for the application of ERISA/common law trust principles in the context of the Ford-UAW SUB Plan, Petitioners may not now seek a writ of certiorari by arguing the opposite.

2. The District Court applied the appropriate law correctly in finding that Ford satisfied its fiduciary duty

Although they claim ERISA/common law trust law is inapplicable, nowhere in the Petition do the Petitioners attack the District Court's application of the law to the facts. In other words, assuming ERISA/common law trust law principles apply in this case, Petitioners have conceded by their silence that those principles were correctly applied below. Therefore, this case presents no meritorious basis even if this were an appeal, much less a compelling reason for this Court to review this case on certiorari.

The two questions Petitioners would present to this Court for review amount to nothing but Petitioners' challenge to the District Court's conclusion even though Petitioners never raised these questions before the Court of Appeals. To request this Court to consider issues that were essentially conceded by Petitioners at the Court of Appeals is improper and unsupportable. Petitioners offer no justification for resurrecting these issues now.

In any event, the record unequivocally supports the District Court's entry of judgment against Petitioners on their breach of fiduciary duty claim. Petitioners have criticized Ford for: (1) not preparing adequate projections of layoffs and the resulting demand on the SUB Fund; (2) not filing for TRA sooner than the UAW did and allegedly being unaware of the "Chrysler strategy"; and (3) not moving quickly enough to recover SUB benefits from those employees whose subsequent receipt of TRA resulted in their receiving too much SUB. The District Court thoroughly reviewed the evidence relating to each allegation and, in each instance, found that Ford had acted reasonably and prudently in its administration of the SUB Plan.

The District Court rejected Petitioners' first criticism. For months prior to the filing of the TRA petition on January 30, 1980, Ford was calculating the effects that changes in production would have on layoffs and demands for SUB benefits. One month after the TRA petition was filed, Ford's projections still showed a healthy SUB Fund. As the District Court found, "Ford's forecasts and projections for the years at issue were well within the industry standard" [Petition Appendix, p. 38a ¶30].

The District Court also rejected Petitioners' second concern when it found that the timing of the petition for TRA was reasonable. The undisputed evidence showed that the bulk of layoffs had not occurred before January 1980, and the Department of Labor had never processed a TRA petition filed in anticipation of layoffs. Furthermore, the UAW (which historically filed TRA petitions for its members) had received strict instructions from Marvin Fooks at Labor to present a complete petition, including supporting documentation, and not to "piece-meal" him. As the District Court found:

> In light of the UAW's prior experience with TRA petitions at DOL, and the evidence presented as to the circumstances surrounding the automotive industry and the position of the DOL regarding TRA petitions at the time of the filing, it was reasonable and prudent of the UAW to gather information, discuss its strategy with the automakers and take the petition to the DOL when it did.

[Petition Appendix, p. 39a ¶31]. The District Court specifically found that Ford and the UAW did communicate regarding the Chrysler strategy long before the TRA petition for Ford workers was filed [Petition Appendix, pp. 11a-12a ¶¶23-24].

Petitioners' third criticism was disposed of when the District Court found that Ford moved as expeditiously as possible to recover the retroactively-created overpayments and to make employees aware of their obligations to repay SUB. Before it could be determined which

employees might be subject to recoupment (and for what amounts), Ford and the UAW conducted a general informational campaign to notify everyone of the repayment obligation. As soon as TRA was deemed "received or receivable" in Kentucky on August 4, 1980, for example, the company began the calculations to determine which employees would have to repay what amounts of SUB. They completed this task by the third week of August, and sent the notices of overpayment required by the SUB Plan by the first week in September. As the District Court correctly concluded:

> Although "overpayments" were inevitable as a result of the DOL's retroactive impact date, Ford took all reasonable steps to insure that employees were notified of their duty to repay the SUB Funds and to start recoupment procedures as soon as practicable.

[Petition Appendix, p. 39a ¶32]. The District Court also noted that the SUB Plan's recoupment provision was Ford's "exclusive remedy for collection of overpayments." [Petition Appendix, p. 17a ¶32 n. 14].

The majority of the Petitioners were not laid off until July of 1980 – six months after the TRA petition was filed and three months after the TRA petition was granted. The crux of the Petitioners' argument is that Ford should have anticipated that these layoffs would occur at Petitioners' facility, and should have taken some steps to preserve SUB Fund assets for future claims (like theirs) that might arise. However, the SUB Plan does not permit such action. As the District Court concluded:

> Even had Ford known of the extent of future layoffs prior to the depletion of the SUB Fund,

> Ford was not permitted by the terms of the Plan to set aside Plan assets to provide for benefit claims which might occur after the Fund was temporarily exhausted. *Allen v. United Mine Workers of America 1979 Benefit Plan*, 726 F.2d 352 (7th Cir. 1984).

[Petition Appendix, p. 39a ¶33]. After reviewing all of the evidence and the allegations by the Petitioners, the District Court succinctly stated: "Ford acted reasonably and prudently even under a de novo standard of review." [Petition Appendix, p. 39a ¶34]. Unquestionably, the District Court took great care to address each of the Respondents' actions which allegedly constituted a breach of fiduciary duty. Considering all of the evidence, the District Court correctly found that Respondents' conduct was above reproach.

Additionally, Petitioners' new claim that Ford had a fiduciary duty to seek outside sources of funding for the SUB Fund has no legal or factual support. The SUB Plan contains detailed, carefully devised and explicit provisions concerning the funding mechanism for the SUB Fund. [Petition Appendix, p. 3a ¶3-4; Art. VII, §5 in Appendix B, pp. App. 27-37]. Those provisions account for diminishing contributions during times of layoff by increasing the rate of the contributions. Petitioners have never argued that Ford deviated from the prescribed funding mechanism. In essence, their new complaint is a challenge to the structure of the funding mechanism itself, claiming Ford and the UAW should have written it to require Ford to seek alternative sources of revenue. The law does not recognize this argument.

What the SUB Plan dictates about funding is a matter of plan design, not a matter of plan administration. The law cannot entertain this challenge to the SUB Plan's design as an alleged breach of fiduciary duty because plan design is not subject to fiduciary standards.

> Decisions respecting whether to offer a pension plan in the first place and what benefit features a plan should have are not matters of plan administration or pension asset management, but rather relate to the design and sponsorship of the plan. They are expressions of company personnel policy made in the exercise of the employer's management prerogative. . . . such decisions are *settlor* acts, not fiduciary acts, and are immune from scrutiny under ERISA's fiduciary standards.

Bryant v. Food Lion, Inc., 774 F. Supp. 1484, 1491 (D.S.C. 1991) (emphasis in original). *See, also, Communications Workers of America, AFL-CIO v. NYNEX Corp.*, 1997 U.S. Dist. LEXIS 2989 (S.D.N.Y. 1997); *Scardelletti v. Bobo*, 897 F.Supp. 913 (D. Md. 1995); *Siskind v. Sperry Retirement Program, UNISYS*, 47 F.3d 498, 505 (2nd Cir. 1995).

3. Petitioners' original claims cannot recur since Congress amended the Trade Act

Finally, there is no need for this Court to grant review since the situation which gave rise to Petitioners' claims can never repeat itself because Congress amended the Trade Act to eliminate retroactive TRA benefits.[5] One

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[5] Even if this situation could repeat itself, the impact would not be as vast as Petitioners' hyperbole claims. Although Petitioners are correct that "hundreds of thousands of

of the unfortunate facts which led to this case being filed initially was the approximately sixteen-month gap between the dates of the Department of Labor's TRA certifications for numerous Ford plants (when employees learned they were eligible to apply for TRA) and the impact date which Labor established for those plants (the retroactive date from which eligible employees could receive TRA).

Under the Trade Act, 19 U.S.C. §§2271, *et seq.*, as it existed in 1980, TRA benefits were paid to laid-off Ford workers retroactive to the impact date. [*See*, 19 U.S.C. §2291 prior to 1981 amendment, Appendix C, pp. App. 46 to App. 47]. That meant many workers learned in April 1980 (the certification date) that they could receive benefits for periods of layoff beginning January 1979, sixteen (16) months prior. Of course, they had already received SUB payments at the maximum rate for those same weeks of layoff. That meant a retroactive, unavoidable SUB overpayment was created for those who received TRA.

Under the Trade Act as amended in 1981, TRA payments are no longer retroactive. [*See*, 19 U.S.C. §2291, Appendix D, pp. App. 48 to App. 49]. The legislative history of the Trade Act makes clear the effect of the 1981 amendment:

> Section 2 of the bill would substantially eliminate retroactive payments by limiting payments to weeks of unemployment which begin more

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employees" participate in SUB plans, the number affected by the events of 1980 is relatively minuscule, approximately 2,000 employees from a total of over 60,000 who were laid off by Ford.

> than 60 days after the date an approved petition for certification was filed.

Pub.L. No. 97-35, 1981 U.S.C.C.A.N. (97 Stat.) 802.

If that had been the case in 1980, there would have been no legal claim by these Petitioners. Even though the large demand for SUB payments temporarily depleted the Fund, there would have been no argument available to Petitioners that Ford somehow could have used the retroactive TRA payments to stop the flow of monies from the SUB Fund.

The District Court found there was no breach of fiduciary duty by Ford, and that issue was never raised before or decided by the Court of Appeals. In any event, it is not an issue that has current implications because of the 1981 amendment to the Trade Act.

CONCLUSION

Respondents, Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan, respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0304P (6th Cir.)
File Name: 96a0304p.06

Nos. 94-6259/6261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD DELK and HAROLD RAMSEY, on behalf of themselves and as representatives of the class herein defined (94-6259); JERRY ARTHUR, WENDELL ROSE, PATRICIA WRIGHT and STEVE WRIGHT, on behalf of themselves and as representatives of the class herein defined (94-6261),	)	ON APPEAL from the United States District Court for the Western District of Kentucky
Plaintiffs-Appellants,	)	No. 94-6259/6261
v.	)	
FORD MOTOR COMPANY; FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW	)	

(94-6259/6261); LELAND JACKSON; RONALD GETTLEFINGER; PAT PELLILO; MEDFORD LEE, individually and as members of defendant, FORD UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN LOCAL COMMITTEE; JOINT BOARD OF ADMINISTRATION OF THE FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN (94-6261),

Defendants-Appellees.

Decided and Filed September 16, 1996

Before: NELSON and MOORE, Circuit Judges; CLELAND, District Judge.[6]

CLELAND, District Judge. These two consolidated class actions challenge the administration of the Supplemental Unemployment Benefit Plan ("SUB Plan"), part of the collective bargaining agreement between Ford Motor Company and the UAW. The Appellants are or were hourly paid UAW union members employed by Ford during the late 1970s and the early 1980s, when Ford and

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[6] The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

other American automobile manufacturers were experiencing a financial crisis, in part as a result of pressure from foreign competition. The Arthur Appellants worked at Ford's Louisville Assembly Plant, and the Delk Appellants worked at the Kentucky Truck Plant. Both challenge the administration of the SUB Plan during this time of financial difficulty, particularly in relation to the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962. The issues presented by the Delk Appellants are whether the district court applied the proper standard of care applicable to the fiduciary-employer of an ERISA-governed plan designed to provide benefits to workers laid off by the employer and whether they have standing to recover benefits directly to them, as opposed to the SUB Plan. The Arthur Plaintiffs ask this court to determine that Ford breached the SUB Plan by failing timely to notify the [sic] them of overpayments of SUB benefits before it acted to recoup those overpayments. After examining the district court's exceptionally thorough Findings of Fact and Conclusions of Law, we find no error and affirm.

I.

Appellants do not challenge the district court's findings of fact, but a review of the rather complex factual background in which this case arose is necessary to an understanding of the issues raised on appeal. Accordingly, we set forth the background facts at length here.

The SUB Plan is a benefit provided in the collective bargaining agreement between Ford and the UAW. As its name implies, the SUB Plan offers eligible laid off

workers extra unemployment benefits during temporary production downturns, to supplement state or federal unemployment benefits. SUB Plans were created in the UAW's 1955 collective bargaining agreement with Ford, General Motors, and Chrysler. The Ford SUB Fund is funded solely by contributions from Ford based on a formula set forth in the Plan.

Employees accumulate credit units based upon actual weeks worked up to a maximum of 52 credits. When employees are laid off, they surrender credit units to receive SUB benefits. The number of credit units required to obtain a benefit for any given week is a function of the level of the Fund, the credit unit cancellation base and the employees' seniority. As the SUB Fund level and the credit unit cancellation base decrease, less senior employees surrender more credit units than more senior employees. If the credit unit cancellation base drops below a level set forth in the Plan, employees with less than 10 years' seniority are not entitled to any SUB benefits.

An employee has no unqualified right to receive SUB benefits; the SUB Plan expressly states that "No person shall have any right, title or interest in or to any of the assets of the Fund. . . . " Nevertheless, to the extent that funds are available, an eligible laid off employee is entitled to receive – and Ford is obligated to pay – SUB benefits. The employee's benefit is "an amount which, when added to his State Benefit and Other Compensation, will equal 95% of his Weekly After-Tax Pay minus $12.50. . . . ."

The Plan expressly includes as a "state" benefit Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962 ("TRA"). TRA is a benefit payable to certain eligible workers laid off because of declining sales due in significant part to competitive imported products. 19 U.S.C. § 2271 *et seq.* (West 1980).

In order for TRA to have any impact on a laid off worker's SUB benefit, it must be "received or receivable." Otherwise, TRA cannot be taken into consideration in deciding the amount of SUB to which a laid off employee is entitled. The same is true of any "State Benefit or Other Compensation." In other words, unless and until TRA is "received or receivable," an employee is contractually entitled to a SUB payment calculated without reference to that "state" benefit; for purposes of the SUB Plan, it is as if the TRA benefit does not exist until it becomes "received or receivable."

For TRA to be awarded, a group of three employees, or the employees' authorized representative, must petition the United States Department of Labor ("Labor") for certification of a plant. The test for certification is whether, in Labor's determination, "increases of imports of articles like or directly competitive with articles produced by" the plant have "contributed importantly to" layoffs and declines in production or sales at that facility. 19 U.S.C. § 2272 (West 1980). If certification is granted, Labor sets an "impact date," *i.e.*, the date on which layoffs due to foreign competition are deemed to have begun. Once Labor certifies a plant, the process is turned over to the relevant state unemployment insurance agency to receive, process and, if warranted, pay claims for TRA benefits filed by individual plant workers. 19

U.S.C. § 2311 (West 1980). While Labor makes the determination as to whether a plant should be certified for TRA, state unemployment agencies decide whether a particular employee at the plant is eligible for TRA and, if so, for which weeks.

Although Labor may certify a plant, not all employees at that plant may be eligible to receive TRA benefits. First, Labor may issue only a partial certification, in which some – but not all – of the vehicles or parts made at that site are certified as being impacted by imported goods. Thus, laid off employees in those plants who do not work on certified products are ineligible for TRA. Second, even workers on certified products are not eligible for TRA if they fail to meet Labor's "26 week test," which requires that the employee work a total of 26 weeks in the prior 52 weeks on a certified product, and receive a certain specified level of wage. Based on his earlier experience with TRA from 1975 to 1979, Leonard Page, Associate General Counsel for the UAW, estimated that 10 to 20% of the workers at a certified plant would be found ineligible for TRA benefits.

In 1979, Ford, General Motors and Chrysler began laying off tens of thousands of employees due to a downturn in automobile and truck sales in the United States caused in part by increasing foreign competition. Pursuant to the SUB Plans in effect at the three companies, laid off UAW workers made applications for and received benefits from the SUB Funds.

In the summer of 1979, Leonard Page, the UAW's unofficial Trade Act Coordinator, began to contemplate

the possibility of obtaining TRA benefits for UAW members nation-wide. The UAW traditionally filed TRA petitions on behalf of its members, and viewed this as its responsibility. The UAW's goal, of course, was to gain maximum benefits for all affected UAW members.

However, Page and the UAW were concerned about the viability of an industry-wide TRA petition. In previous experiences with TRA, there was litigation between the UAW and Labor over whether the large American-made cars could ever be "like or directly competitive with" imported subcompacts. In 1975 and 1977, Labor analyzed TRA petitions using a market segment approach and certified primarily U.S. plants that manufactured subcompact or small luxury cars (*e.g.* Bobcats and Pintos at Ford). In those years, Labor refused to certify approximately 70% of the Ford and Chrysler plants and approximately 90% of the GM plants.

Labor's market segment approach also made it difficult to obtain certification for parts plants. Parts plants typically produced parts for all sizes of cars; to obtain certification for all or a portion of a parts plant, the UAW had to show that some or all parts produced there were ultimately included in a car manufactured by an assembly plant which was certified for TRA. Thus, few parts plants were certified before 1979.

In late 1979, knowing that it faced an uphill battle, the UAW decided not to go with a massive, industry-wide petition but, rather, to present Labor first with the worst-case scenario: Chrysler. Chrysler had experienced the worst layoffs of the Big 3 automakers – its SUB Fund was virtually depleted and the company was in dire

financial straits. This data would make the strongest case of injury to the truck and midsize and luxury car markets from smaller imported vehicles. If Labor granted the Chrysler petition, it would establish a precedent that larger model cars and trucks were "like or directly competitive with" smaller, import models. At that point, Labor would be hard pressed to deny certification to Ford or GM plants that made similar size and model vehicles.

At the same time that the UAW was formulating its "Chrysler First" strategy, from July through October of 1979, Ford's SUB Fund was under special scrutiny by Ford and the UAW as they negotiated a new collective bargaining agreement. F.E. Becker, the SUB Fund Analyst in Ford's Finance Department, used a computer model to cost out the potential UAW demands concerning the SUB Plan, taking into account the current Fund level and projected layoffs. At no time during the negotiations did Becker's model show that the Fund would be unable to meet the benefit demands of laid off workers, and the UAW was satisfied that the SUB Fund would survive any demands based on the projected economic outlook.

Even after the negotiations ended, Becker continued to prepare projections of SUB Fund levels based upon Ford's vehicle production plans and monthly reports of SUB applications made and benefits. His December 1979 projection showed that the SUB Fund would contain $125.3 million in assets by December 1980, which equated to 41% of maximum funding, a healthy fund.

On November 6, 1979 – when Ford was still projecting a healthy fund through December of 1980 – Labor certified all but one of the plants in the UAW's Chrysler

mass petition. The UAW was surprised by the scope of its success. Now knowing the potential scope of certification, UAW immediately commenced work on petitions for Ford and GM plants. Collecting the necessary information and data for the Ford and GM petitions was a massive undertaking. UAW plant representatives gathered data, with assistance from Ford, and provided Page with all the information he requested to complete the petition.

Several events required Page to postpone filing the petitions until late January 1980. First, layoffs at Ford and GM continued to increase, and Page repeatedly amended the draft petitions to include the new data. Second, in January 1980, Page called Marvin Fooks at Labor to notify him that the GM and Ford petitions would soon be filed. Fooks told Page that a major problem in Labor's investigation of the Chrysler petition was gathering sufficient data to determine which parts plants should be certified. Fooks asked Page to provide such data to Labor in the Ford and GM petitions; Fooks specifically instructed Page to file comprehensive petitions and not to "piece-meal" him.

The UAW filed the Ford petition on January 30, 1980. The Ford petition sought certification of 59 Ford plants, including the Louisville Assembly Plant and the Kentucky Truck Plant.

In February 1980, the month after the Ford TRA petition was filed, Becker's forecasts still showed that the SUB Fund would remain healthy and able to satisfy the benefit applications of eligible workers, notwithstanding increasing numbers of layoffs. Ford's economic forecasts

and projections were as accurate, if not more so, than those of any other automaker. Indeed, the mid-February production program called for an increase in production activity and a corresponding decrease in layoffs; it was also anticipated that as many as 4,500 employees (approximately 10% of those then on indefinite layoff) would be recalled. In fact, Ford recalled 2,500 employees in February of 1980.

However, the March 1980 production program presented a much different picture – a precipitous decrease in production of 300,000 units, and a corresponding increase in layoffs. Becker's March 27, 1980 projection, based on this dramatically different production program, forecast that the SUB Fund could become depleted by August 1980.

In March, UAW and Ford representatives met to discuss ways to accelerate the ability to offset TRA from SUB, if Labor certified Ford plants, thereby minimizing payouts from the SUB Fund. Under the UAW-Ford Collective Bargaining Agreement, no changes in SUB Plan terms could be made during the life of the Agreement; however, Ford and the UAW could jointly interpret SUB Plan provisions. Under the express terms of the SUB Plan, TRA could not be taken into account in computing SUB benefits unless and until it was "received or receivable." Until then, an eligible employee was contractually entitled to a SUB benefit calculated without reference to any potential TRA.

The term "received or receivable" is not defined in the SUB Plan. Historically, Ford and the UAW had interpreted the term to mean that time when an individual

employee had made an application for TRA for the same week he or she was seeking SUB, and had either received a TRA payment or was about to do so. This definition of "receivable" was too restrictive in the context of TRA payments. The Trade Act contained no deadline for when an employee must apply for TRA (or, indeed, any requirement that an application be made at all), and employees receiving SUB benefits had little incentive to apply for TRA. Thus, under the old interpretation of "received or receivable," Ford could be prevented from offsetting TRA from SUB indefinitely, since each employee was actually required to apply for TRA before TRA could have any effect on his or her SUB payments.

On the other hand, experience had shown that there was likely to be a lag between the date on which a plant was certified for TRA and the date on which benefits would be received – if at all – by individual workers. Typically, approximately 10-20% of workers at a certified plant would be ineligible for TRA because of partial certifications and the "26 week test." Further, it usually took months for the state agencies to gear up to accept TRA applications and to be in a position to pay TRA benefits. Therefore, if TRA benefits were deemed "receivable" when a plant was certified, SUB benefits, upon which laid off workers depended to replace their lost salaries, would be reduced or eliminated because of TRA benefits that might be delayed for many months – or never paid at all. In short, if benefits were deemed "received or receivable" too late, employees would enjoy double benefits at the expense of the fund (and, therefore, some fellow employees). On the other hand, if benefits were deemed "received or receivable" too soon, workers

might have a lapse in benefits. To complicate the matter, workers had no obligation to inform the fund when they received TRA, and, in fact, they had an incentive to conceal that information in order to impede recoupment of overpayments.

On April 8, 1980, Ford and the UAW entered into the Ryder-Bannon Agreement, which reinterpreted the term "receivable" in a way that would help conserve SUB funds if Ford plants were certified without creating hardships for laid off workers. The Ryder-Bannon Agreement provided, in pertinent part:

> When employees have been certified as eligible for TRA, [Ford] will do everything possible to provide the state agency involved with payroll data required to facilitate processing of claims and payment of TRA benefits and otherwise cooperate with the state agency. Based on a reasonable time for filing applications and the time the state agency requires to process claims, a date will be established by the SUB Board of Administration for taking account of TRA which employees at each location are eligible to receive in the calculation or recalculation of SUB benefits. The SUB Board of Administration shall closely monitor the performance of the state agencies with the objective of avoiding any interruption in TRA benefits to the extent possible. Upon the date(s) established by the SUB Board of Administration, SUB will be reduced for all employees at each certified location eligible for TRA.

Thus, under this Agreement, TRA benefits were deemed "receivable" by an eligible employee once the state agency was able to process and pay promptly any TRA

claims, regardless of whether he or she had actually made a claim for TRA. Ford could deduct the value of TRA benefits from SUB payments without waiting until an employee actually applied for TRA benefits, but laid off workers would receive full SUB benefits (to the extent allowed by the SUB Plan) until TRA benefits were actually available to them. The effect of this agreement was to give incentive to TRA-eligible employees to apply for them. If they did not, their SUB benefits would be reduced by the amount of TRA they would have received if they had applied.

On April 17, and April 25, 1980, Labor certified that some employees at the Louisville Assembly Plant and 56 other Ford plants (not including the Kentucky Truck Plant) would be eligible to apply for TRA. The "impact date" for the Louisville Assembly Plant was set retroactively at January 30, 1979, one year prior to the date of the petition. This retroactivity further compounded the SUB Plan's difficulties; the Trade Act has since been amended to eliminate the possibility of retroactive impact dates.

As a result of this retroactive certification, certain employees who had been laid off after January 30, 1979, (including the Arthurs) would be eligible for TRA benefits for weeks of layoff for which they had already received SUB and state unemployment benefits equal to 95% of take-home pay. Once TRA benefits for those weeks became "receivable," some of the SUB payments made for those same weeks would become overpayments. Under the terms of the Plan, if Ford determines that an overpayment has occurred, it has the right to recover that amount from the employee if it provides

written notice thereof to the employee within 120 days after the overpayment is "established or created."

When Labor certified the 57 Ford plants on April 17 and 25, 1980, the relevant state unemployment agencies were not yet in a position to process and pay TRA claims. Because Ford did not yet know which employees would receive what amounts of TRA, no actual overpayments could be established and Ford could not begin recouping SUB overpayments from laid off workers under the Plan terms. As a result, laid off employees continued to receive the full amount of their SUB benefits for weeks after January 30, 1979, without deduction for TRA.

On June 30, 1980, as a result of benefit payments to over 75,000 laid off workers, the SUB Fund dropped to its lowest level ever. The SUB Plan itself contemplates precisely this situation, where a heavy demand for benefits during a time of extraordinary layoffs temporarily depletes the Fund's assets. In these circumstances, benefit payments are reduced or eliminated depending upon the severity of the depletion and the employee's seniority. However, the Plan also requires Ford to increase the amount of its regular contributions as the Fund balance decreases, in order to restore the Fund quickly to a healthy funding level.

A large number of hourly workers at the Kentucky Truck Plant, including most members of the Delks' class, were laid off on July 25, 1980. From that date for approximately three and one-half months, laid off Kentucky Truck Plant workers with less than ten years' service (like their counterparts at other Ford plants) received no SUB payments due to the level of the Fund.

By continually monitoring the progress and funding status of the state unemployment agencies, the SUB Board of Administration determined that by August 4, 1980, the Unemployment Division of Kentucky was in a position to process and promptly pay TRA applications upon receipt. The Joint Board is a six-member body; three members are appointed by Ford, and three are appointed by the UAW. Thus, pursuant to the Ryder-Bannon Agreement, TRA benefits were presumed to be "receivable" after August 4, 1980, by Ford employees in Kentucky who were receiving or had received SUB from January 30, 1979 forward. Kentucky was able to make a handful of TRA payments August 4, 1980, but federal funding for TRA temporarily dried up almost immediately. Patricia Wright, one of the Arthur Plaintiffs, received her first TRA check on May 14, 1980. The evidence indicates that this check was the first received by any class member.

As a result, some part of the SUB payments made to Kentucky employees for weeks after January 30, 1979, although contractually required when made, later became overpayments. Under the Plan, if Ford determines that a SUB overpayment exists, it may recoup that amount from the employee provided that "written notice thereof" is given to the employee within 120 days from the date that the overpayment was "established or created." An employee has the right to appeal a notice of overpayment to the SUB Joint Board of Administration. If no appeal is filed, or if the determination is upheld, then the employee must return the amount to the Plan. If an employee fails to return any overpayment as required by the Plan, then the company can recoup the amount by making deductions from future SUB payments (not to exceed $20 per

week) or from future salary (not to exceed $30 per week). The recoupment process requires three things: (1) the company must determine that an overpayment exists; (2) a written notice of the amount of the overpayment must be sent to the employee; and (3) notice of the amount of the overpayment must be sent within 120 days of the date on which the overpayment was "established or created."

There were no viable alternatives to recoupment other than following the express terms of the Plan. In previous litigation involving Ford and the UAW in which Ford sought to recover overpayments, the court had ruled that the SUB Plan provisions were the exclusive mechanism by which the company could collect overpayments. *Soboleski v. Ford Motor Co.*, No. 76-2240, Slip. Op. (D. N.J. March 11, 1977). Additionally, in the mid-seventies, the UAW asked Labor whether TRA benefits could be paid directly to the SUB Fund, thus avoiding the recoupment process entirely. The Solicitor for Labor expressly refused to pay TRA to anyone (including the UAW) other than the particular individual entitled to receive the benefit.

Ford promptly set about determining whether an employee's receipt of retroactive TRA would result in a SUB overpayment (and, if so, the amount of the overpayment) so that those individuals could be notified of the amount they owed to the Fund. To do so, Ford had to determine the amount of TRA received by each employee as well as the layoff weeks to which each payment was attributable. Ford asked the various state agencies to supply this information, but the agencies refused on the ground that divulging information about a particular

employee would violate his or her privacy rights. Consequently, Ford had to devise a computer program to reconstruct the computations made by the state agencies. Using this program, Ford's central data processing center attempted to determine whether an individual was eligible for TRA, and, if so, the amounts of TRA and the weeks for which TRA was receivable. This information was compared to the amounts and weeks of SUB received by that employee to establish whether he or she had been overpaid from the SUB Fund as a result of the retroactive TRA benefits.

The data processing center completed calculations for the Louisville Assembly Plant employees by the third week of August, 1980. Within one week, the overpayment notices were shipped to the Louisville Assembly Plant with instructions to the personnel department to send them to employees by certified or registered mail immediately upon receipt. The Arthur Plaintiffs received their overpayment notices by September 9, 1980. Even before the formal notices were sent out on September 5, 1980, most employees were aware of their obligations to repay TRA-generated SUB overpayments. The UAW and Ford had conducted campaigns designed to notify the employees of their repayment obligations. Literature concerning the topic was circulated among Ford employees during the spring and summer of 1980. On April 23, 1980, the UAW sent a notice to all Louisville Assembly Plant UAW members detailing the effects of the Plant's TRA certification and explaining how the employees should proceed. The Arthur Plaintiffs admit receiving these notices or seeing them on bulletin boards, well before the

formal overpayment notices were sent out in early September.

As Arthur Plaintiff Wendell Rose testified, "probably every employee . . . realized that they were receiving more than what they should," as a result of the retroactive receipt of TRA. Indeed, combining his SUB benefits and state unemployment benefits (including TRA), Mr. Rose received approximately double the amount that he would have earned had he been working. And, of course, he was not even working for Ford.

Nevertheless, the Arthurs appealed their overpayment determinations to the SUB Joint Board of Administration, arguing that the overpayment calculations were incorrect and that the recoupment efforts themselves were improper. The Joint Board denied the appeal on December 19, 1980. Because the Arthurs failed to repay SUB voluntarily after that decision, Ford began making deductions from future SUB and/or wages as authorized by the Plan. As to those employees who did not return to work and had exhausted all their SUB benefits, Ford really had no effective recourse to recoup SUB overpayments. Indeed, Arthur Plaintiff Patricia Wright has not repaid any of the SUB overpayments she received. The Arthurs then filed a complaint with the Kentucky Labor Cabinet, charging that Ford had unlawfully withheld sums from their paychecks. The Cabinet dismissed the charges and ruled that the deductions were properly made.

From November 16, 1980 until December 29, 1980, workers with less than ten years' service received slightly reduced SUB payments. Full SUB payments were

resumed to all eligible employees on December 29, 1980, when the Fund was restored to a healthy level as a result of Ford's increased contributions.

Under the terms of the SUB Plan, an employee trades credit units for SUB benefits. An employee is allotted credit units based on seniority and number of hours worked. While the Delks were prohibited from or restricted in trading credit units for benefits during that five month period from July to December, thereafter they were able to use their credit units to receive benefits.

II.

The First Issue raised by the Delk Plaintiffs is whether the district court applied the proper standard of care applicable to the fiduciary-employer of an ERISA-governed plan designed to provide benefits to workers laid off by the employer. The Delk Plaintiffs argue that the district court applied the arbitrary and capricious standard but should have applied the prudent person standard; the defendants argue that the district court did apply the prudent person standard.

The question whether the trial court applied the proper standard of review is an issue of law subject to *de novo* review. *See Complaint of Paducah Towing Co., Inc.*, 692 F.2d 412, 422 (6th Cir. 1982).

After reviewing the extensive findings of fact and conclusions of law made by the trial court, this court finds that the district court did apply the proper standard of review. The court noted – and the parties do not dispute – (1) that the plaintiffs' claims under the Labor

Management Relations Act were subject to the arbitrary and capricious standard, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444 (6th Cir. 1992); (2) that, under ERISA, where the plan grants discretion in specific terms, the denial of benefits or interpretation of the plan by the trustee or administrator is to be overturned only if it is arbitrary and capricious, *Cairns v. Bridgestone/Firestone, Inc.*, 802 F. Supp. 152 (N.D. Ohio 1992); (3) that claims of wrongful denial of benefits are reviewed under a *de novo* standard unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and (4) that, in general, the fiduciary's conduct is measured by the objective, prudent person standard, 29 U.S.C. § 1104(a)(1)(B).

In accordance with the multiple levels of review prescribed by ERISA and the cases interpreting it, the district court applied different standards in analyzing different decisions. For example, the court applied the arbitrary and capricious standard to Ford's determination of employees' eligibility to collect SUB benefits, the amount of benefit to which each employee was entitled, the number of credits an employee must surrender to receive a SUB benefit, and whether an overpayment occurred. Findings of Fact and Conclusions of Law, para. 12. It is equally clear that the court applied the prudence standard to the plaintiffs' claims that Ford and the UAW failed to adequately preserve the assets of the SUB Fund. *See* Findings of Fact and Conclusions of Law, para's 22-26,

The court stated in this section of its Findings of Fact and Conclusions of Law:

> The Court must evaluate the 'prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them.' *Marshall v. Glass/Metal Ass'n and Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Hawaii 1980).

Findings of Fact and Conclusions of Law, para. 26. The court added, "A fiduciary's conduct is to be judged according to the standards of others acting in a like capacity and familiar with such matters. *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), *cert. denied*, 469 U.S. 1072, 105 S. Ct. 565 (1984)." Findings of Fact and Conclusions of Law, para. 28. This is the objective, prudent person standard which the plaintiffs advocate. After examining all of the plaintiffs' claims, each under its appropriate standard of review, the court concluded: "This Court concludes as a matter of law that Ford's actions were not arbitrary or capricious and that given the information available to Ford during the period in question, Ford acted reasonably and prudently even under a *de novo* standard of review." Findings of Fact and Conclusions of Law, para. 34. The court properly judged each alleged impropriety under the appropriate standard.

III.

The Delk Plaintiffs' second issue is whether they have standing to recover benefits directly to them, as opposed to the Plan. The trial court bifurcated the liability and damages issues for trial. Because the trial court

found no liability – and this court affirms that determination – there is no need to determine whether the individuals have standing to recover benefits directly to them; no benefits are recoverable by either the plaintiffs or the SUB Plan.

IV.

The Arthur Plaintiffs ask this court to find that Ford breached the SUB Plan by failing timely to notify them of overpayments of SUB benefits before it acted to recoup those overpayments.

The SUB Plan permits Ford to recoup overpayments, unless, *inter alia*, "notice has not been given within 120 days from the date the overpayment was established or created, . . . " This is the phrase the court must interpret. There is no dispute that the Arthur class members received overpayments and received notices of overpayment of SUB benefits on or about September 9, 1980. The question is when the 120-day period began to run.

Members of the Arthur class argue that the 120-day period began to run on April 17, 1980, when the Secretary of Labor determined and certified the plant at which they worked as sufficiently affected by foreign trade so as to make the workers eligible for TRA benefits. Ford contends that the relevant date is August 4, 1980, the date determined by the Joint Board of Administration pursuant to the Ryder-Bannon Agreement. The trial court did not pinpoint the date on which the overpayments were established or created but rather concluded that, under any reasonable interpretation, they were not established or created more than 120 days before September 9, 1980.

We conclude that the district court was correct in finding that the notice of overpayment was timely and in rejecting the Arthur Plaintiffs' contention that the trigger date should be April 17, 1980. First, on April 17, 1980, no member of the Arthur class had actually received SUB benefits; the first payment was received on May 14, 1980 by Arthur Plaintiff Patricia Wright. Second, while the April 17, 1980 certification by the Department of Labor established that some employees would probably receive TRA benefits, it did not establish which ones would receive them or in what amount. The states themselves had not yet made those determinations in April 1980, and Ford could not have been expected to know the amounts of over payments at that time. It is simply not sensible to construe the phrase "established or created" as April 17, 1980 – before any Arthur Plaintiff actually received any TRA benefits and before even the state had determined which employees would receive TRA benefits and in what amounts. Furthermore, if the SUB Plan had begun recoupment in April, employees would have had a lapse in benefits. By waiting, the SUB Plan ensured that workers were receiving benefits.

The earliest the overpayments could possibly have been established or created was May 14, 1980, when the first Arthur Plaintiff received the first TRA check. It is equally sensible to place the trigger date at August 4, 1980, the date on which the Plan, as modified by the Ryder-Bannon Agreement, permitted Ford to begin off-setting TRA benefits against SUB benefits. The district court's finding is correct.

The findings of fact and conclusions of law of the district court are affirmed in all respects.

APPENDIX B

ARTICLE VII

FINANCIAL PROVISIONS AND REPORTS

Section 1. Establishment of Fund

The Company shall establish, in accordance with the Plan, a Fund with a qualified bank or banks or a qualified trust company or companies selected by the Company as Trustee. The Company's contributions shall be made into the Fund, the assets of which shall be held, invested and applied by the Trustee, all in accordance with the Plan. Automatic Short Week Benefits shall be payable by the Company. All other Benefits and Separation Payments shall be payable only from the Fund. The company shall provide in the trust agreement that the assets of the Fund shall be held in cash or invested only in:

(i) general obligations of the United States Government and obligations of any agency or instrumentality of the United States Government or of any United States Government sponsored private corporation, or obligations of any other organization which are backed by the full faith and credit of, or are contractual obligations of the United States; and/or

(ii) prime quality short-term obligations such as commercial paper, bankers acceptances, certificates of deposit, or similar investments, and/or

(iii) a common, collective or commingled investment fund consisting of any combination of the investments under (i) and (ii) above;

irrespective of the rate of return, or the absence of any return, thereon, and without any absolute or relative limit

upon the amount that may be invested in any one or more types of investment. The Trustee shall not be liable for the making or retaining of any such investment or for realized or unrealized loss thereon whether for normal or abnormal economic conditions or otherwise.

Section 2. Maximum Funding

(a) Maximum Funding of the Fund shall be determined for each calendar month (and for each Pay Period when required by the provisions of Section 3(b) of this Article) by multiplying the Average Full Benefit Rate by 12 and this result by the sum of

(1) the average number of Covered Employes on the Active Employment Rolls receiving pay, and

(2) the average number of persons laid off from work as Covered Employes who are not included in (1) but who have Credit Units;

both numbers being determined by the Company on the basis of the average number of Employes during 52 consecutive weeks ending with the 3rd Sunday preceding the first Monday in the month for which the Maximum Funding is being determined.

(b) (1) The Average Full Benefit Rate for the purpose of determining Maximum Funding shall be computed monthly and shall be the amount determined by dividing (i) the total dollar amount of all Full Benefits paid during the 12 months immediately prior to the month next preceding the month for which Maximum Funding is being determined, by (ii) the number of such Full Benefits paid.

(2) A Full Benefit shall mean (i) a Regular Benefit which has not been reduced because of Other

Compensation as defined in Section 3(a) of Article II and (ii) a Leveling Week Benefit.

Section 3. CUCB (Credit Unit Cancellation Base)

(a) A CUCB shall be determined for each calendar month in the following manner: The current market value of the total assets in the Fund as of the close of business on the last day of the immediately preceding month as certified by the Trustee (plus, as provided in Section 5(c) of this Article, additional contribution amounts, if any, to be added to the market value of the assets for Automatic Short Week Benefits for Scheduled Short Workweeks paid during the previous month) shall be divided by the number of persons used in determining Maximum Funding for such month.

(b) The CUCB for any particular month shall be applied to each of the Pay Periods beginning within such month; provided, however, that whenever the CUCB for any particular month beginning prior to January 1, 1980 is less than $180.00, beginning on or after January 1, 1980 but before January 1, 1982 is less than $198.00 or beginning on or after January 1, 1982 is less than $211.00, the CUCB shall be applied only to the first Pay Period beginning within such month, and thereafter there shall be determined a CUCB for each Pay Period until the CUCB for a particular Pay Period equals or exceeds the CUCB stated for such period. When the CUCB for a particular Pay Period equals or exceeds the CUCB stated for such period, such CUCB shall be applied to each Pay Period until a CUCB for the following calendar month shall be applicable. The CUCB for a particular Pay Period shall be determined on the basis of the current market value of the total assets in the Fund as of the close of business on the Friday preceding such Pay

Period as certified by the Trustee (plus, as provided in Section 5(c) of this Article, additional contribution amounts, if any, to be added to the market value of the assets for Automatic Short Week Benefits for Scheduled Short Workweeks paid during the previous month).

Section 4. Finality of Determinations

No adjustment in the Maximum Funding or the CUCB shall be made on account of any subsequently discovered error in the computations or the figures used in making the computations, unless such adjustment is practicable. Any adjustment made shall only be prospective in effect, unless such adjustment would be substantial in the opinion of the Company. Nothing in the foregoing shall be construed to excuse the Company from making up any shortage in its contributions to the Fund.

Section 5. Company Contributions

With respect to each of the Pay Periods which begins within a month for which the current market value of the assets of the Fund (determined as of the close of business on the last day of the immediately preceding month) is less than the Maximum Funding, the Company shall make a contribution to the Fund equal to the lesser of the following amounts:

(a) The amount required to increase the value of the assets of the Fund (determined as of the date set forth above) to, but not in excess of, 100% of the Maximum Funding of the Fund; or

(b) (1) An amount determined by multiplying (i) the number of straight time hours, time and one-

half hours, and double time hours, respectively, for which Employes shall have received pay from the Company (excluding any hours for which Benefits hereunder are payable to Employees) for such Pay Period, by (ii) the applicable number of cents-per-hour, depending upon the percentage relationship of the value of the assets of the Fund to the Maximum Funding of the Fund, as determined in accordance with Table A below for each such Pay Period that begins after January 1, 1979, but on or before January 1, 1982 and in accordance with Table B below for each such Pay Period that begins on or after January 1, 1982;

TABLE A

Percentage relationship of Fund assets to Maximum Funding		Applicable number of cents per straight time hour	Applicable number of cents per time and one-half hour	Applicable number of cents per double-time hour
At Least	But less Than			
77.5%	100.0%	14¢	20¢	26¢
70.0%	77.5%	15¢	21¢	27¢
62.5%	70.0%	16¢	22¢	28¢
55.0%	62.5%	17¢	23¢	29¢
47.5%	55.0%	18¢	24¢	30¢
40.0%	47.5%	19¢	25¢	31¢
32.5%	40.0%	20¢	26¢	32¢
25.0%	32.5%	21¢	27¢	33¢
17.5%	25.0%	22¢	28¢	34¢
10.0%	17.5%	23¢	29¢	35¢
Less than	10%	24¢	30¢	36¢

TABLE B

Percentage relationship of Fund assets to Maximum Funding		Applicable number of cents per straight time hour	Applicable number of cents per time and one-half hour	Applicable number of cents per double-time hour
At Least	But less Than			
85.0%	100.0%	14¢	20¢	26¢
77.5%	85.0%	15¢	21¢	27¢
70.0%	77.5%	16¢	22¢	28¢
62.5%	70.0%	17¢	23¢	29¢
55.0%	62.5%	18¢	24¢	30¢
47.5%	55.0%	19¢	25¢	31¢
40.0%	47.5%	20¢	26¢	32¢
32.5%	40.0%	21¢	27¢	33¢
25.0%	32.5%	22¢	28¢	34¢
17.5%	25.0%	23¢	29¢	35¢
10.0%	17.5%	24¢	30¢	36¢
2.5%	10.0%	25¢	31¢	37¢
Less than	2.5%	26¢	32¢	38¢

(2) If, for any such Pay Period, the total number of hours for which Employes shall have received pay from the Company when multiplied by the applicable number of cents-per-hour is more than the number of hours required to increase the value of the assets of the Fund to the next higher percentage of Maximum Funding, only the number of hours required to reach the next such higher percentage shall be multiplied by the applicable cents-per-hour set forth in the appropriate table. The remaining hours (the difference between the total number of hours and the lesser number of hours required to reach the next higher percentage) shall be multiplied by

the applicable lesser cents-per-hour set forth in the appropriate table for the next higher percentage.

(c) Short Workweek Contributions

(1) After calendar year 1979 and after each subsequent calendar year, if the market value of the assets of the Fund as of the close of business on the last day of December, 1979 and the last day of each December thereafter is less than 100% of Maximum Funding, the Company shall make a contribution to the Fund, if required by the following computation, in an amount equal to the amount, if any, by which (a) the total dollar amount of Automatic Short Week Benefits paid for layoffs that occurred during Pay Periods beginning in the preceding calendar year (excluding any such Benefit paid for a layoff resulting exclusively from an act of God, as defined below, or part of such Benefit attributable to the period during which the act of God continues to necessitate the layoff) exceeds (b) the amount determined by multiplying four cents ($.04) for calendar years 1978 and 1979, and five cents ($.05) for calendar year 1980 and thereafter by the total number of hours for which Employes received pay from the Company for Pay Periods beginning in such calendar year minus (c) the total of any contributions made for months within such calendar year pursuant to Subsection (2) of this Section 5(c), but not in excess of the amount necessary to increase the market value of the assets of the Fund to 100% of Maximum Funding. The term "act of God" as used in this Subsection means an occurrence or circumstance directly affecting a Company Plant or Plants which results from natural causes exclusively and is in no sense attributable to

human negligence, influence, intervention or control; the result solely of natural causes and not of human acts.

(2) If the CUCB for the month is less than $625, the Company shall make, in addition to any contribution under Subsection (a) or (b) of this Section, a contribution equal to the lesser of:

(i) the amount of any Automatic Short Week Benefits paid for Scheduled Short Workweeks commencing during the preceding month which were offset against Company contributions in accordance with Subsection (d) of this Section; or

(ii) the amount necessary to bring the CUCB up to $625 for the month with respect to which such contribution is made.

The amount of any contribution under this Subsection shall be added to the market value of the assets of the Fund for purposes of determining the CUCB to be used for all purposes under the Plan for the month with respect to which any such contribution is made.

(d) Additional Company Contributions

If after any required contributions are made under Subsection (a) or (b) and under Subsection (c) of this Section for any Pay Period, the Fund does not have sufficient assets to pay Regular Benefits otherwise due and payable under the Plan, and if there are applications due and payable for Regular Benefits as follows:

(1) Weeks beginning prior to January 1, 1980, during which the CUCB exceeded $32.99;

(2) Weeks beginning on or after January 1, 1980 and before January 1, 1982, during which the CUCB exceeded $36.49; or

(3) Weeks beginning on or after January 1, 1982 during which the CUCB exceeded $38.49;

the Company shall make an additional contribution to the Fund equal to the amount of such Regular Benefits.

(e) Contributions Based on Guaranteed Benefit Account

If after any required contributions are made under Subsection (a) or (b) and under Subsections (c), and (d) of this Section for any Pay Period beginning on or after October 1, 1979, the Fund does not have assets to pay Regular Benefits otherwise due and payable under the Plan to Employes with ten (10) or more years of Seniority, the Company shall make an additional contribution to the Fund equal to the lesser of:

(1) an amount sufficient to pay such Regular Benefits; or

(2) an amount equal to (A) $400 multiplied by the average number of covered employes and other persons used in determining Maximum Funding for the month of September, 1979 under Article VII, Section 2(a) of the 1976 Supplemental Unemployment Benefit Plan, less (B) the sum of contributions previously made under this Subsection (e).

(f) Reduction in Contributions

(1) The Company's contributions to the Fund, as determined under Subsections (a), or (b) and (c) of this Section, shall be reduced by:

(i) the amounts of Automatic Short Week Benefits paid by the Company (other than Benefits

paid for Scheduled Short Workweeks in Pay Periods with respect to which the CUCB is less than $625);

(ii) all amounts paid by the Company to provide Moving Allowances under Article IX, Section 28(b) of the Collective Bargaining Agreement;

(iii) the amounts of any Benefits and lump sum payments paid by the Company to separated Employes under other agreements, dated October 4, 1979, between the Company and the Union which specifically provide that the amount of such Benefits and lump sum payments as are paid thereunder shall be deducted from contributions required under the Plan.

(iv) the amount of any Company contributions under Subsection (d) above; and

(v) One-half of the amount of any Company contributions paid under Subsection 5(e) above that are in excess of an amount equal to the product of $200 multiplied by the average number of Employes used in determining Maximum Funding for the month of September, 1979 (such total excess amount hereinafter referred to as the "recoverable amount"). If the percentage relationship of the value of the assets of the Fund to Maximum Funding is seventy percent (70%) or more, an amount equal to five cents-per-hour times the total number of hours for which Employes shall have received pay from the Company (excluding any hours for which Benefits hereunder are payable) for such Pay Period but not more than an amount equal to the remaining one-half of the "recoverable amount." The accumulative total amount of all reductions under

this Subsection 5(f)(1)(v) shall not exceed the total "recoverable amount" of Company contributions paid under Subsection 5(e) above.

(2) If contributions to the Fund are not required for any period, or if the contributions required are less than the amounts to be offset under Paragraph (1) above, then any subsequently required contributions shall be reduced by the amount not previously offset against contributions. Any such amount determined under Subparagraphs (i), (ii), (iii) and (iv) not previously offset against contributions shall be deducted from the market value of the assets in the Fund in determining the CUCB and the relationship of the assets of the Fund to Maximum Funding. Also, any such amount determined under Subsection 5(f)(1)(v) above relating to the immediately recoverable one-half of the "recoverable amount" of contributions that has not previously been offset against contributions, shall be deducted from the market value of the assets in the Fund in determining the CUCB and the relationship of the asset of the Fund to Maximum Funding.

(g) Definition of Scheduled and Unscheduled Short Workweek

(1) For purposes of the Plan, a Scheduled Short Workweek with respect to an Employe is a Short Workweek which management schedules in order to reduce the production of the Plant, department or other unit in which the Employe works to a level below the level at which the production of such Plant, department or unit would be for the Week were it not a Short Workweek, but only where such reduction of production is for the purpose of adjusting production to customer demand.

(2) For purposes of the Plan, an Unscheduled Short workweek with respect to an Employe is any Short Workweek:

(i) which is not a scheduled Short Workweek as defined in Paragraph (1) of this Subsection;

(ii) in which an Employe returns to work from layoff to replace a separated or absent Employe (including an Employe failing to respond or tardy in responding to recall), or returns to work, after a full Week of layoff, in connection with an increase in production, but only to the extent that the Short Workweek is attributable to such cause; or

(iii) in which an Employe last works at the beginning of, or in which he first works at the end of, a model change period as defined under Article VIII, Section 21(a) of the Collective Bargaining Agreement.

(3) For any Short Workweek which includes both Scheduled and Unscheduled Short Workweek circumstances with respect to an Employe:

(i) the number of hours by which 40 exceeds his Compensated or Available Hours shall be deemed to be hours for which a Benefit for a Scheduled Short Workweek is paid to the extent that such hours do not exceed the hours not worked for reasons set forth in Paragraph (1) of this Subsection, and

(ii) any remaining hours shall be deemed to be hours for which a Benefit is paid for an Unscheduled Short Workweek.

(4) The Company will give written notice to the Union members of the Local Committee and to the Union at the time of layoff of the reason or reasons for any

Short Workweek with respect to which the CUCB is less than $625.

In addition, with respect to any Short Workweek layoff that results from an act of God, the Company will give written notice to the Union members of the Local Committee and to the Union no later than the end of the Week following the Short Workweek showing the reason or reasons for such Short Workweek, and an explanation of the incident which caused the Company to determine that the layoff was the result of an act of God, as defined in Section 5(c)(1) of this Article.

(h) When Contributions Are Payable

(1) Each contribution by the Company shall be made on or before the close of business on the first regularly scheduled workday in the second calendar week following the pay day for the Pay Period with respect to which the contribution is being made.

(2) Contributions with respect to Covered Employes at any additional Plant at which the Collective Bargaining Agreement becomes applicable shall commence with respect to the first Pay Period beginning after

(i) the date of certification by the National Labor Relations Board of the Union as the collective bargaining representative of Employes at such Plan, or,

(ii) if recognition is by agreement, the effective date of the agreement by which the Company recognizes the Union as the collective bargaining representative of Employes at such Plant.

(i) Effect of Withholding

If the Company at any time shall be required to withhold any amount from any contribution to the Fund by reason

of any federal, state or municipal law or regulation, the Company shall have the right to deduct such amount from such contribution and to pay only the balance to the Fund.

(j) No Contribution Obligation

Notwithstanding any other provisions of the Plan, the Company shall not be obligated to make any contribution to the Fund with respect to any Pay Period which begins within a month for which the current market value of the assets in the Fund (determined as of the close of business on the last day of the immediately preceding month) is equal to or in excess of the Maximum Funding, and no contribution to the Fund for any Pay Period shall be in excess of the amount necessary to bring the total market value of the assets in the Fund up to the Maximum Funding.

Section 6. Liability

(a) The provisions of these Articles I through XI, together with the provisions of any Alternate Benefit plans established and maintained pursuant to the Plan, constitute the entire Plan. The provisions of this Article VII express, and shall be deemed to express, completely each and every obligation of the Company with respect to the financing of the Plan and providing for Benefits and Separation Payments. The Company shall not be obligated to make up, or to provide for making up, any depreciation, or loss arising from depreciation, in the value of the securities held in the Fund (other than as contributions by the Company may be required under the provisions of this Article, when the market value of the assets of the Fund is less than the Maximum Funding); and

the Union shall not call upon the Company to make up, or to provide for making up, any such depreciation or loss.

(b) The Board, the Company, the Trustee, and the Union, and each of them, shall not be liable because of any act or failure to act on the part of any of the others, and each is authorized to rely upon the correctness of any information furnished to it by an authorized representative of any of the others.

(c) Notwithstanding the above provisions, nothing in this Section shall be deemed to relieve any person from liability for willful misconduct or fraud or from responsibility or liability for any obligation or duty under ERISA.

Section 7. No Vested Interest

No person shall have any right, title or interest in or to any of the assets of the Fund or in or to any Company contribution thereto.

Section 8. Company Reports

(a) Market Value of Fund Assets

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish a statement to the Union, based on reports from the Trustee, showing a reconciliation of the Fund activity during the preceding month. The total market value of the Fund will be determined as of the close of business on the last day of each month. The reconciliation for the monthly period reported will show the amount of Company contributions received by the Fund by date, the total amount of Benefits and Separation Payments paid from the Fund, the

amount of any expenses charged to the Fund and the amount of gain or loss in the Fund assets.

(b) Company Payments Not Recovered from Company Contributions

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish a statement to the Union showing, with respect to the preceding month's activity, a reconciliation of the amount, if any, of payments paid by the Company which could not be offset against Company contributions to the Fund and which were deducted from the market value of the assets in the Fund in determining the relationship of the assets of the Fund to Maximum Funding. Such reconciliation will show the total amount of any such additional Company payments paid and the total amount of such Company payment deducted from Company contributions, during the period covered by the report.

(c) Maximum Funding and CUCB

Not later than the third Tuesday following the first Monday of each month the Company shall notify the Board and the Union of the amount of the Maximum Funding and the CUCB as determined by it from time to time under the Plan and shall furnish a statement showing the Average Full Benefit Rate (showing a breakdown of the included number and amount of Full Benefits paid) and the numbers of Employes in each category in each month and the average number used in determining Maximum Funding.

(d) Contributions and Direct Company Payments

Not later than the third Tuesday following the first Monday of each month the Company shall furnish a statement to the Union showing for the preceding month:

(1) The number of hours for which Employes shall have received pay from the Company and the number of such hours with respect to which the Company shall not have made contributions to the Fund as provided in Section 5(j) of this Article during each period for which contributions were made to the Fund or would have been made to the Fund, except for the provision of Section 5(j) of this Article.

(2) The number of hours and the amount of the Company contributions at each applicable number of cents per hour with respect to which the Company shall have made contributions to the Fund and the amount of any Scheduled Short Workweek contributions by the Company.

(3) The amount of Automatic Short Week Benefits by which the amount determined in (2) above was reduced.

(4) The number of lump-sum payments paid by the Company in the State of Georgia in accordance with the Letter Agreement dated October 4, 1979, between the Company and the Union, and the amount of such lump-sum payments by which the amount determined in (2) above was reduced.

(5) The number of Benefits and of lump-sum payments paid by the Company to certain Employes who are retired in accordance with the Letter Agreement dated October 4, 1979, between the Company and the Union, and the respective amount of such Benefits and lump-sum payments by which the amount determined in (2) above was reduced.

(6) The amount of contributions the Company shall have made to the Fund in accordance with Section 5(d) of this Article VII.

(7) The amount of contributions the Company shall have made to the Fund in accordance with Section 5(e) of this Article VII, including the amount of any recovery of such contributions made by the Company, pursuant to Subsection 5(f)(1)(v) of this Article VII.

(8) The total amount of the Company contribution which was made to the Fund.

(e) Benefits and Separation Payments Paid from Fund

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish a statement to the Union showing the number and amount of payments, if any, made from the Fund during each Week of the preceding month, as:

(1) Leveling Week Benefits.

(2) Regular Benefits paid to Employes who were eligible for a State System Benefit shown separately as Regular Benefits paid with and without reduction for Other Compensation.

(3) Regular Benefits paid without reduction for Other Compensation to Employes who were not eligible for a State System Benefit for one or more of the reasons set forth in Section 1(b) of Article I, shown separately for reasons thereunder as follows and not included in any of the foregoing:

(i) Section 1(b)(ii) and (vi) when maximum Benefit amount applies

(ii) all other items under Article I, Section 1(b).

(4) Regular Benefits paid with reduction for Other Compensation to Employes who were not eligible for a State System Benefit for one or more of the reasons set forth in Section 1(b) of Article I, shown separately for reasons thereunder as follows and not included in any of the foregoing:

(i) Section 1(b)(ii) and (vi) when maximum Benefit amounts applies

(ii) all other items Article I, Section 1(b).

(5) Regular Benefits paid to Employes who were eligible with respect to some but not all of the regular work days in a Week, as provided in Section 3(d) of Article I, and not included in any of the foregoing, shown separately as Regular Benefits paid with and without reduction for Other Compensation.

(6) Separation Payments.

(f) Automatic Short Week Benefits Paid by Company

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish to the Union a statement showing the number and amount of Automatic Short Week Benefits, if any, paid by the Company during each Week of the preceding month; and with respect to any Week for which the amount of Scheduled Automatic Short Week Benefits is not deductible from Company contributions because of the Fund position, the number and amount of Scheduled and Unscheduled Benefits paid, respectively.

(g) The Company shall furnish the Board and the Union quarterly a listing by Plant showing the names of the persons who, during the preceding calendar quarter, accepted a Separation Payment, together with both

the individual gross and net amounts of such Separation Payments.

(h) On or before April 30 of each year, the Company shall furnish to the Union a statement, certified by a qualified independent firm of certified public accountants selected by the Company, verifying the accuracy of the information furnished by the Company during the preceding year pursuant to Subsections (a), (b), (c), (d), (e) and (f) of this Section.

(i) The Company or the Trustee shall furnish annually to each Employe who received Benefits or a Separation Payment, or both, during the year a statement showing the total amount received and any amount of tax withheld therefrom.

(j) On or before April 30 of each year, the Company shall furnish to the Union a statement showing the number of Employes receiving Regular Benefits during the preceding year, distributed according to the number of such Benefits received.

(k) On or before April 30 of each year, the Company shall furnish to the Union a statement showing the average State System Benefit received by Employes for weeks with respect to which they received Regular Benefits paid without reduction for Other Compensation as defined in Section 3(a) of Article II during the preceding year.

(l) On or before April 30 of each year, the Company shall furnish to the Union a statement showing the amount of any contribution made to the Fund in accordance with Section 5(c)(1) of this Article for Automatic Short Week Benefit payments.

(m) On or before January 31 of each year, the Company shall furnish to the Union a statement showing the number of Employes to whom Guaranteed Annual Income Credit Units were credited on the preceding

Guarantee Date and the number of such Guaranteed Annual Income Credit Units both distributed according to the Seniority brackets set forth in the table in Section 1(a) of Article III-A and according to the number of Credit Units which were credited (numbers above 13 being grouped in intervals of 5).

(n) After December 31 of each year, the Company shall furnish to each Employe credited with Credit Units as of each such date a statement showing the number of such Credit Units.

(o) The Company will comply with reasonable requests by the Union for other statistical information on the operation of the Plan which the Company may have compiled.

Section 9. Costs of Administering the Plan

(a) Expenses of Trustee

The costs and expenses incurred by the Trustee under the Plan, and the fees charged by the Trustee, shall be charged to the Fund.

(b) Expenses of the Board of Administration

The compensation of the Chairman of the Board, which shall be in such amount and on such basis as may be determined by the other members of the Board, shall be shared equally by the Company and the Union. The Company members and the Union members of the Board and of Local Committees shall serve without compensation from the Fund. Reasonable and necessary expenses of the Board for forms and stationery required in connection with the handling of appeals shall be borne by the Company.

(c) Cost of Services

The Company shall be reimbursed each year from the Fund for the cost to the Company of bank fees and auditing fees for services performed in connection with the Plan and the Fund.

Section 10. Benefit and Separation Payment Drafts Not Presented

If the Trustee has segregated any portion of the Fund in connection with any determination that a Benefit or Separation Payment is payable under the Plan and the amount of such Benefit or Separation Payment is not claimed within a period of 2 years from the date of such determination, such amount shall revert to the Fund.

APPENDIX C

§ 2273. Determinations by Secretary of Labor

Certification of eligibility

(a) As soon as possible after the date on which a petition is filed under section 2271 of this title, but in any event not later than 60 days after that date, the Secretary shall determine whether the petitioning group meets the requirements of section 2272 of this title and shall issue a certification of eligibility to apply for assistance under this part covering workers in any group which meets such requirements. Each certification shall specify the date on which the total or partial separation began or threatened to begin.

§ 2291. Trade readjustment allowances; qualifying requirements for workers

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part who files an application for such allowance for any week of unemployment which begins after the date specified in such certification pursuant to section 2273(a) of this title, if the following conditions are met:

(1) Such worker's last total or partial separation before his application under this part, occurred –

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment, and

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 of this title was made, and

(C) before the termination date (if any) determined pursuant to section 2273(d) of this title; and

(2) Such worker had, in the 52 weeks immediately preceding such total or partial separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary.

APPENDIX D

§ 2271. Petitions

(a) Filing of petition; publication of notice

A petition for a certification of eligibility to apply for adjustment assistance under this subpart may be filed with the Secretary of Labor (hereinafter in this part referred to as the "Secretary") by a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) or by their certified or recognized union or other duly authorized representative. Upon receipt of the petition, the Secretary shall promptly publish notice in the Federal Register that he has received the petition and initiated an investigation.

(b) Hearing

If the petitioner, or any other person found by the Secretary to have a substantial interest in the proceedings, submits not later than 10 days after the date of the Secretary's publication under subsection (a) of this section a request for a hearing, the Secretary shall provide for a public hearing and afford such interested persons an opportunity to be present, to produce evidence, and to be heard.

§ 2291. Qualifying requirements for workers

(a) Trade readjustment allowance conditions

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part who files an application for such allowance for any week of unemployment which

begins more than 60 days after the date on which the petition that resulted in such certification was filed under section 2271 of this title, if the following conditions are met:

(1) Such worker's total or partial separation before his application under this part occurred –

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment,

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 of this title was made, and

(C) before the termination date (if any) determined pursuant to section 2273(d) of this title.

(2) Such worker had, in the 52-week period ending with the week in which such total or partial separation occurred, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment with a firm are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary. For the purposes of this paragraph, any week in which such worker –

(A) is on employer-authorized leave for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training,

(B) does not work because of a disability that is compensable under a workmen's compensation law or plan of a State or the United States,

(C) had his employment interrupted in order to serve as a full-time representative of a labor organization in such firm or subdivision, or

(D) is on call-up for purposes of active duty in a reserve status in the Armed Forces of the United States, provided such active duty is "Federal service" as defined in section 8521(a)(1) of Title 5, and

shall be treated as a week of employment at wages of $30 or more, but not more than 7 weeks, in case of weeks described in subparagraph (A) or (C), or both (and not more than 26 weeks, in the case of weeks described in subparagraph (B) or (D), may be treated as weeks of employment under this sentence.

(3) Such worker –

(A) was entitled to (or would be entitled to if he applied therefor) unemployment insurance for a week within the benefit period (i) in which such total or partial separation took place, or (ii) which began (or would have begun) by reason of the filing of a claim for unemployment insurance by such worker after such total or partial separation;

(B) has exhausted all rights to any unemployment insurance to which he was entitled (or would be entitled if he applied therefor); and

(C) does not have an unexpired waiting period applicable to him for any such unemployment insurance.

(4) Such worker, with respect to such week of unemployment, would not be disqualified for extended compensation payable under the Federal-State Extended Unemployment Compensation Act of 1970 by reason of the work acceptance and job search requirements in section 202(a)(3) of such Act.

(5) Such worker –

(A) is enrolled in a training program approved by the Secretary under section 2296(a) of this title,

(B) has, after the date on which the worker became totally separated, or partially separated, from the adversely affected employment, completed a training program approved by the Secretary under section 2296(a) of this title, or

(C) has received a written statement certified under subsection (c)(1) of this section after the date described in subparagraph (B).